SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1087

HOLBROOK THAYER ASHTON, II,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 22, 1969

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IN THE

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No. .....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Eastern District of Missouri, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages . It is also set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals was entered on December 24, 1968 (denial of petition for rehearing); see Appendix B to this petition. This petition for Writ of Certiorari is filed within the required thirty days' time, as extended. See Appendix C.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED

The sole question presented is the use of draftees in the Vietnam war.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the pertinent portions of the Pact of Paris, 1928, commonly called the Kellogg-Briand Pact [with two interpretations added], the Treaty of London, Aug. 8, 1945, Art. VI, Clause 2 of the United States Constitution, and of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A.App.). They are set forth in Appendix D.

5. STATEMENT OF CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 U.S.C.

App. § 462 [TR. 1]*; that he became a registrant of Local Board No. 101 of the Selective Service System, State of Missouri, and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 101 to report for and submit to induction into the armed services of the United States [TR. 1].

Petitioner pleaded not guilty, waived jury trial and was tried in the Eastern District of Missouri [TR. 100]. A written motion for judgment of acquittal was filed [TR. 8-9]. The motion was denied and the petitioner was found guilty, and thereafter was sentenced and admitted to bail pending appeal [TR. 101].

6. THE FACTS

Petitioner registered with Local Board No. 101, was classified in Class I-A and kept there despite of his protestatations of conscientious objections to military training and service. When ordered to report for induction he refused to submit to the ceremony, that is, when ordered to take the symbolic step forward he stood still.

7. REASONS FOR GRANTING WRIT

The sole question raised by Petitioner calls for a definitive answer to an oft-raised and not to be downed question:

May draftees be used in an undeclared war? Related questions (legality of the war) are, of course, lurking in this question.

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*TR. refers to District Court's Transcript of Record.

ARGUMENT

The Court of Appeals did not deal with the question of the legality of the present war in Vietnam, nor the right of a citizen under the present law of the land to refuse participation in an illegal war, nor the right to use draftees in it.

War as an instrument of national policy was outlawed by the Pact of Paris of August 27, 1928 (commonly called the Kellogg-Briand Pact). Mr. Justice Jackson, the chief United States prosecutor at the Nuremberg trial, stated:

> "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them."

The Treaty of London of August 8, 1945 declares that waging a war of aggression is a crime against peace imposing individual responsibility. Article 8 of that treaty declared that the fact that an individual acted pursuant to an order of his government or of a superior "shall not free him from responsibility."

The United States was a party to the Kellogg-Briand Pact and the Treaty of London. Article VI, Clause 2 of the United States Constitution states that treaties are a part of "the supreme law of the land; and the Judges in every state shall be bound thereby."

As Mr. Justice Douglas stated, in *Mitchell* v. *U. S.*, 386 U.S. 972, 18 L.Ed.2d 132-133:

> "There is a considerable body of opinion that our actions in Vietnam constitute the waging of an aggressive 'war'."

Appellant claims that the war in Vietnam is a war of aggression within the meaning of the Treaty of London

and that such war is "outlawed" in international law by the Pact of Paris of August 27, 1928 (Kellogg-Briand Pact). (For arguments supporting Appellant's contention of the illegality of United States participation in the Vietnam war see Appellant's Brief, pages 34 to 41.)

Thus it is contended that under international law the appellant is under grave responsibility to refuse participation in any form in a war of aggression. Appellant contends that under international law citizens cannot participate in an illegal war and said citizens have an obligation, in law and in conscience, to oppose their own government when it attempts to wage an illegal war. The opinion of the judges at Nuremberg is quite clear on this point of international law.

If aggressive war is "henceforth an illegal thing" (to quote the French Foreign Minister M. Briand on the occasion of the United States signing the General Treaty for the Renunciation of War), and if the war in Vietnam is an aggressive war, and if there is individual responsibility to refuse participation, then it follows that an individual would have standing to raise such an issue as a defense to criminal prosecution in the federal courts. The fact that the United States adhered to the Pact of Paris, the Treaty of London, and other treaties, gives appellant standing. Such treaties are the law of the land and bind the individual citizen as well as the officers of government.

To hold that the citizen has no standing in a situation as the one presented is to compel appellant to abdicate his conscience and participate in action which violates the law of his own nation, international law and the laws of civilization itself.

Wherefore, upon the foregoing ground, and for other reasons, appearing in appellant's brief, it is respectfully urged that a rehearing be granted in this matter, and that

the mandate of this Court be stayed pending the disposition of this petition.

Counsel represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

Respectfully,

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Attorney for Appellant

February 22, 1969

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,213

Holbrook Thayer Ashton, II, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[December 3, 1968.]

Before VAN OOSTERHOUT, Chief Judge; BLACKMUN and LAY, Circuit Judges.

LAY, Circuit Judge.

Defendant Ashton appeals a judgment of conviction for failure to report for and submit to induction into the Armed Forces of the United States in violation of Tit. 50 U.S.C. § 462. We affirm.

Defendant urges that there exists "no basis in fact" for his classification and therefore his failure to exhaust administrative remedies under the Selective Service Act is immaterial. We disagree. Although failure to appeal one's classification does not preclude a collateral attack in all cases,[1] the exhaustion rule cannot be lightly dis-

1. See *Glover* v. *United States*, 286 F.2d 84 (8 Cir. 1961); *Van Bibber* v. *United States*, 151 F.2d 444 (8 Cir. 1945). In *Glover* we said:

> "We adhere to the general rule as to the necessity for exhaustion of administrative remedies in order to obtain a judicial review, and are of the opinion that such rule is generally applicable and usually necessary. However, we are of the view that such general rule is not absolute, inflexible and without exception, but that it is to be relaxed only under extremely exceptional and unusual circumstances. The factual situation presented in this case is appropriate for and requires the relaxation of such rule." 286 F.2d at 90-91.

carded by a simple plea of procedural ignorance, as attempted here.[2] When administrative remedies are not exhausted, exceptional circumstances must exist for judicial review of the claimed erroneous classification. None are shown here, and we need not reach the issue raised.[3] *Edwards* v. *United States,* 395 F.2d 453 (9 Cir. 1968).

Defendant asserts that he "was not given all the opportunities provided by the regulations to go through the mandatory induction prerequisites at the induction station." Defendant argues that he was not provided a "second choice" to refuse induction. See *Chernekoff* v. *United States,* 219 F.2d 721 (9 Cir. 1955). Ashton claims relevancy to the principles of *Chernekoff* in that the induction officer failed to warn him *explicitly* of the *exact* penalty for refusing to submit to induction.

In *Chernekoff* v. *United States,* supra, referring to the Army regulations,[4] the court said, at 725:

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2. Defendant's earlier administrative appeals to the local board demonstrate his knowledge of administrative procedure. He appealed from his 1-A classification in February of 1967. After being turned down by the appeals board he, for the first time, requested form SSS 150 for conscientious objector. After returning the same his case was reviewed and he was once again classified 1-A. This was on April 19, 1967. He did not appeal this classification.

3. Although we do not pass upon defendant's classification, his asserted ground as a conscientious objector relates a doubtful prima facie case under *United States* v. *Seeger,* 380 U.S. 163 (1965). Defendant told the board on April 20, 1966, "Philosophy is my major, it is sort of an accumulative field. I have no objection to being drafted, although it would handicap me." At that time he was given a 2-S classification until February 1, 1967. When Ashton signed his conscientious objector form on April 13, 1967, he said he could not answer the question as to his belief in a "Supreme Being" for lack of definitive terms. He stated the source of his conscientious objection was "philosophy." Excluded under Tit. 50 U.S.C. § 456(j) are beliefs based essentially on "political, sociological or philosophical views or a merely personal moral code." Cf. *Witmer* v. *United States,* 348 U.S. 375 (1955).

4. Special Regulation 615-180-1(27)(b) is quoted in 219 F.2d at 724.

> "One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than $10,000, or both. The regulation is couched in mandatory, not discretionary, language."

Assuming *arguendo* defendant's claim that failure to inform him of the exact severity and extent of punishment violates the regulation, we feel a fair reading of the record does not support defendant's contention. Lt. Coccari testified that at the induction ceremony when Ashton refused to step forward he *read* the regulation to Ashton and particularly form AR 601270 which sets forth the terms of the punishment itself. This evidence was not in any way rebutted by Ashton. Under these circumstances we find no evidentiary merit to this argument.

We pass now to the constitutional issues raised by defendant.

Ashton first attacks the overall constitutionality of the draft laws and the alleged illegal use of draftees because there exists no emergency or declaration of war. Such attack merits little discussion. This argument has been consistently rejected. *Selective Draft Law Cases,* 245 U.S. 366 (1918); *United States* v. *Hogan,* 369 F.2d 359 (2 Cir. 1966); *United States* v. *Bolton,* 192 F.2d 805 (2 Cir. 1951) (per curiam); *United States* v. *Henderson,* 180 F.2d 711 (7 Cir. 1950); *United States* v. *Herling,* 120 F.2d 236 (2 Cir. 1951).[5]

The United States Supreme Court in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), recently observed in the draft card burning case:

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5. See also the excellent opinion by Senior District Judge John Delehant, *United States* v. *Richmond,* 274 F.Supp. 43 (C.D. Cal. 1967), for a history of such actions, and for a thorough treatment of *Kneedler* v. *Lane,* 45 Pa.St. 238, upon which defendant relies.

> "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter* v. *United States*, 334 U.S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918); see also *Ex Parte Quirin*, 317 U.S. 1, 25-26 (1942). The power of Congress to classify and conscript manpower for military service is 'beyond question.'"

Defendant likewise raises the question of the legality of use of draftees in Vietnam and of the Vietnam War itself. Defendant lacks standing to raise such issues. He has received no order to go to Vietnam. See *United States* v. *Bolton*, supra. And compare *Johnson* v. *Eisenstrager*, 339 U.S. 763, 789 (1950).

In *United States* v. *Mitchell*, 369 F.2d 323, 324 (2 Cir. 1966), a similar argument was aptly answered:

> "Nevertheless, appellant's allegations are not a defense to a prosecution for failure to report for induction into the Armed Forces and his evidence was properly excluded. Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service and our nation's efforts in Vietnam, as a matter of law the congressional power 'to raise and support armies' and 'to provide and maintain a navy' is a matter quite distinct from the use to which the Executive makes of those who have been found qualified and who have been inducted into the Armed Forces. Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress."

See also *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir. 1967), cert. den.; *Mora* v. *McNamara*, 389 U.S. 934 (1967). The reasoning is apposite here.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19213

Holbrook Thayer Ashton, II, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and is hereby, denied.

December 24, 1968.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

HOLBROOK THAYER ASHTON,
Petitioner,

vs.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 22, 1969.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 17th day of January, 1969.

APPENDIX D

The Kellogg-Briand Pact
officially called

THE PACT OF PARIS: THE TREATY FOR THE RENUNCIATION OF WAR OF AUGUST 27, 1928

declared:

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Official Text of the Treaty is to be found in Appendix F. pages 354-355 of S. O. LEVINSON AND THE PACT OF PARIS by John E. Stoner, Chicago, Illinois, University of Chicago Press, 1942.

The Justices of the INTERNATIONAL MILITARY TRIBUNAL, Nurnberg, Germany, declared concerning the Kellogg-Briand Pact:

The question is, what was the legal effect of this pact? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an

instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact.

page 50
INTERNATIONAL MILITARY TRIBUNAL
Nurnberg, Germany
"OPINION AND JUDGMENT"
United States Government Printing Office
Washington, D.C., 1947

A standard scholarly work on international law declares:

J. L. BRIERLY
THE LAW OF NATIONS
Sixth Edition
Oxford University Press
1963
pp. 409-410

The Pact of Paris—the Briand-Kellogg Pact—is an instrument of outstanding importance: signed or adhered to by a great many members of the international community, it declares in the most categorical terms the absolute illegality of war in pursuit of national policies. Moreover, having been concluded outside the League [of Nations], it did not perish with the League, and being fully consistent with the provisions of the Charter [of the United

Nations], retains its full force today. . . . There can be no question that the general obligations contained in them, prohibiting recourse to war for the settlement of disputes and requiring disputes to be settled by pacific means, reflected and recorded a fundamental change in customary law in regard to the legality of war. These obligations had become part of general international law binding on states whether or not they were parties to the Covenant or the Pact.

TREATY OF LONDON is quoted in the Opening Brief on page 34, footnote 14:

14. Aug. 8, 1945, 59 Stat. 1544, which in Article (a) declares that "waging a war of aggression is a 'crime against peace' imposing 'individual responsibility.'" Article 8 provides:

> "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Constitution

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1087

HOLBROOK THAYER ASHTON, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Missouri for failure to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for five years, with eligibility for parole after one year. The conviction was affirmed on December 3, 1968 (Pet. App. A), and a petition for rehearing was denied on December 24, 1968 (Pet. App. B). On January 17, 1969, Mr. Justice White extended the time within

which to file a petition for a writ of certiorari until February 22, 1969. The petition was not filed until February 25, 1969, and is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, there is no warrant for further review.

Petitioner here contends only that draftees may not be used in an undeclared war and that the war in Vietnam is illegal (Pet. 2). Since these claims would in no event provide a valid defense to a prosecution for refusal to submit to induction (*United States* v. *Mitchell*, 369 F. 2d 323, 324 (C.A. 2), certiorari denied, 386 U.S. 972), the questions petitioner seeks to raise are not presented in the circumstances of the instant case. Moreover, this Court has rejected, in the past several years, invitations to consider such issues. *United States* v. *Mitchell, supra; Luftig* v. *McNamara*, 373 F.2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F.2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934.

It is therefore respectfully submitted that the petion for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

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SUPREME COURT, U. S.

APR 21 1969

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MOTION FOR RECONSIDERATION AND TO FILE SUPPLEMENT TO PETITION

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner invites the Court's attention to the following:

1. Petitioner Ashton's case involves a point now being stressed for a special reason, one recited below.

This point, in the words of the Eighth Circuit opinion is, "Defendant urges that there exists 'no basis in fact' for his classification and therefore his failure to exhaust administrative remedies under the Selective Service Act is immaterial. We disagree."

2. This Court *has granted certiorari,* this Term, in a case involving exactly this type of problem.

In the words of the Solicitor General [in his Brief for the United States in Opposition, in the *Matter of Sorrano* v. *U.S.A.*, Oct. Term, 1968, No. 838]:

> "Since the validity of the exhaustion of administrative remedies doctrine is now pending before the Court in McKart v. United States, No. 403 this Term, and, DuVernay v. United States, No. 814 this Term, the Court may wish to defer action on this petition until it decides those cases."

Respectfully,

J. B. TIETZ
Attorney for Petitioner

APRIL 9, 1969